Supreme Court, U.S.
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No. 94-795

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Shelia Marie Brothers, *et al.*,
Petitioners,

v.

Johnny Klevenhagen, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Johnny Klevenhagen in his Official Capacity as Sheriff of Harris County, Texas and Harris County, Texas do not concur with Petitioners' statement of "Questions Presented." Respondents urge that the following constitutes an accurate presentation of the substantive questions presented by Petitioners in their Petition for Writ of Certiorari:

1. Whether the United States Court of Appeals for the Fifth Circuit is correct in analyzing claims of excessive force brought by pretrial detainees under the Due Process Clause of the Fourteenth Amendment?

2. Whether the United States Court of Appeals for the Fifth Circuit correctly applies a Fourteenth Amendment analysis to excessive force claims brought by pre-trial detainees?

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STATEMENT OF THE CASE

One of the primary responsibilities of the Harris County Sheriff is to manage the Harris County Jail. In any given month, the inmate population of the central jail and its annexes approximates 14,000 persons. Although the jail houses misdemeanor pretrial detainees and convicted persons, the vast majority of those confined are either convicted felons or are felony pretrial detainees. Out of the total jail population, approximately 29% (over 3,500) inmates are felony pretrial detainees and approximately 56% (over 6,900) are convicted felons who are awaiting transfer to the Texas Department of Criminal Justice or are being held in the jail for various other reasons. Thus, approximately 85% of Harris County Jail inmates are either charged with a felony or have already been convicted of a felony offense.

Many of the felony jail prisoners have been charged with and/or convicted of serious, violent criminal offenses. These inmates pose a significant threat to the general public if they were to escape from the custody of the jail. Furthermore, even inmates who do not have charges or convictions involving violent conduct may indeed demonstrate violent conduct if an attempt is made to apprehend them in the course of or following an escape from the jail. These concerns are compounded by the fact that many repeat offenders attempt to avoid disclosure of their prior violent criminal background by providing false identifying information when they are arrested and charged with a new offense. In such instances, which are recurring, persons charged with misdemeanor or non-violent felony offenses often have serious violent criminal histories which are unknown to jail officials.

In an effort to maintain order and security in the jail, to protect the public from escaped prisoners and to assure that pretrial detainees appear at trial, the Harris County Sheriff's Department follows the provisions of Texas Penal Code Ann. §9.52 (Vernon 1992) permitting deputy sheriffs to use deadly force when they believe it to be immediately necessary to prevent prisoners from escaping from the Harris County Jail.

Section 9.52 of the Texas Penal Code provides that:

> The use of force to prevent the escape of an arrested person from custody is justifiable when the force could have been employed to effect the arrest under which the person is in custody, except that a guard employed by a penal institution or a peace officer is justified using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

Tex. Pen. Code Ann. 9.52 (Vernon 1992).

The Provisions of § 9.52 are virtually identical to parallel provisions contained in the Model Penal Code. Model Penal Code §3.07(3).

On November 5, 1988, Plaintiff, Roland Brothers, Jr., using the alias Michael Reed, was arrested in Harris County by the City of Jersey Village Police Department on a felony charge of auto theft. Because he had outstanding felony and misdemeanor arrest warrants, he was turned over to the custody of Harris County Sheriff's Detectives Barry Rizk and

Robert Nichols. At that time, Brothers had already been processed by the Jersey Village Police Department and had spent several hours in their jail. Mr. Brothers had previously been convicted and placed on felony probation for two other offenses using the name Michael Reed. These convictions were in Harris County. Additionally, Mr. Brothers had an outstanding warrant for felony escape from the State of Louisiana and had several other arrests and convictions in that state including, attempted robbery.

Detectives Rizk and Nichols believed that Brothers had been charged in Louisiana with some type of robbery and was "either extremely dangerous or considered dangerous."

The two detectives took Mr. Brothers into their custody and transported him to the Harris County Jail, entering the facility through what is known as the "sallyport." The sallyport is a secured area inside the confines of the jail facility where prisoners are unloaded. As one enters the sallyport, an electric door opens to let the vehicle in and then closes as it passes through. The officers got out of the vehicle and Detective Nichols told the sallyport control operator to close the main doors so they could remove Mr. Brothers from the car and bring him into the booking area. As they approached the control booth, they turned around and noticed that Mr. Brothers had managed to remove his leg and wrist restraints and had exited the vehicle. Mr. Brothers then ran toward the sallyport door as it began descending. The officers drew their weapons and ordered Mr. Brothers to stop. Mr. Brothers disregarded their command to stop and raced to get under the door before it closed. The officers, believing that Mr. Brothers would escape from the jail if he got under the door before it closed, fired their weapons as he was crouching to slip under the closing door. As the officers discharged their weapons, the sallyport door closed completely. When the

door was reopened, Mr. Brothers was found lying on the pavement having been struck by the officers' pistol fire. Mr. Brothers died from the injuries sustained in the escape attempt.

It is undisputed that the use of deadly force was immediately necessary to prevent his escape. He ignored all commands to stop and if the deputies had not fired their weapons, he would have slipped under the closing door and effected his escape.

Petitioners filed this suit pursuant to 42 U.S.C. § 1983 claiming Respondents deprived Roland J. Brothers, Jr. of the rights secured to him by the Fourth and Fourteenth Amendments to the Constitution of the United States. The complaint alleged that Mr. Brothers was shot while attempting to escape from the custody of the Harris County jail. Suit was filed against the two officers involved in the shooting, Harris County, Texas and Sheriff Klevenhagen in his official capacity only. The individual defendants were dismissed by agreement of the parties.

In February, 1993, the parties filed cross-motions for summary judgment. On April 22, 1993, Judge Kenneth M. Hoyt signed an Order (entered on April 23, 1993) granting the Respondents' motion for summary judgment and denying the Petitioners' motion for summary judgment. On April 23, 1993, a Final Judgment was entered dismissing the Petitioners' lawsuit.

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. That Court found that the Due Process Clause of the Fourteenth Amendment is the constitutional standard for evaluating excessive force claims brought by an individual who attempts to escape custody during transportation from one holding cell to another. The

Court further held that under a Due Process analysis, the constitutional rights of Brothers were not violated.

From the judgment of the United States Court of Appeals for the Fifth Circuit, Petitioners seek review by this Court.

SUMMARY OF THE ARGUMENT

This case should not be reviewed on certiorari because it conflicts with no other circuit court opinions commanding reconciliation by this Court, because the Fifth Circuit's opinion is fairly narrow in effect and raises no issues of national importance.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE FIFTH CIRCUIT'S BROTHERS OPINION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS DECIDING THESE SAME OR SIMILAR MATTERS.

A. FOURTEENTH AMENDMENT IS CORRECT STANDARD

The threshold inquiry in this matter is how the various circuits are analyzing excessive force claims. Whether other protections of the Fourth Amendment do or do not extend into incarceration is not relevant to a reasoned discussion of the Fifth Circuit's decision in this case. The rationale for this is simple. Excessive force cases arising during an arrest are considered a "seizure" under *Graham v. Connor*, 490 U.S.

386 (1989) and are therefore analyzed under the Fourth Amendment and its protection against unreasonable seizures. *Graham*, 490 U.S. at 388. However, the concept of an excessive force claim being analyzed as "seizure" under the Fourth Amendment does not logically carry over after incarceration because, quite simply, how can one seize what is already seized? For this reason, the various circuits hold that excessive force claims arising after pretrial detention has begun are analyzed under the Due Process Clause of the Fourteenth Amendment rather than under the Fourth Amendment prohibition against unreasonable seizures.

Because the Fourth Amendment protects against unreasonable seizures, its protections are directed at the initial act of seizing. *Wilkins v. May*, 872 F.2d 190, 192-93 (7th Cir. 1989); *Valencia v. Wiggins*, 981 F.2d 1440, 1444 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2998 (1993). Petitioners claim that the circuits are split on this issue. Such is not the case. Although there may be a diversity of opinion on which Fourth Amendment protections extend on into incarceration, there is no apparent conflict with the Fifth Circuit's opinion that in excessive force cases, the Fourth Amendment protections give way to due process concerns in situations such as that involving Mr. Brothers - a man who had been formally charged, was in custody, had been released from the arresting officers' custody and was being transported from one holding cell to another.[1]

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[1] Although there is some difference of opinion among the circuits as to the point in time when pretrial detention begins, there is no conflict with the facts of this case since Brothers had already been processed at the City of Jersey Village and did not need a probable cause hearing having already been charged (he had outstanding warrants for his arrest). Therefore, in the

Although some circuits are not consistent as to when pretrial detention begins, among those circuits that have addressed the issue, there appears to be a uniformity in holding that the Fourth Amendment is not applicable to excessive force claims brought by pretrial detainees.

This Court has not yet ruled upon the question of whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of physical force beyond the point at which arrest ends and pretrial detention begins. *Graham v. Connor,* 490 U.S. at 395, n. 10. While this may be true, the Fifth Circuit correctly decided the issue and there is no significant split among the circuits warranting this court's review.

a. The Second Circuit

In the Second Circuit, the Due Process Clause is recognized as protecting pretrial detainees from the use of excessive force that amounts to punishment. *Brown v. Doe*, 2 F.3d 1236 (2d Cir. 1993). That circuit has held that the Fourth Amendment standard probably should be applied prior to the time when the person arrested is arraigned or formally charged, and remains in the custody of the arresting officers. *Powell v. Gardner*, 891 F.2d 1039 (2d Cir. 1989). Mr. Brothers had already been charged and was no longer in the custody of the arresting officers. Therefore, even in the Second Circuit, Brothers' complaint would be analyzed under a Due Process framework.

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spectrum between arrest and pretrial detention, Brothers was at the far end, well into pretrial detention.

b. **The Third Circuit**

The Third Circuit recognizes that the Fourteenth Amendment is applicable to claims by pretrial detainees. *Brown v. Borough of Chambersburg*, 903 F.2d 274, 278 (3rd Cir. 1990). See also, *Bieros v. Nicola*, 860 F. Supp. 226 (D. Pa. 1994).

c. **The Fourth Circuit**

Petitioners contend, as they did in the Fifth Circuit, that the case of *Justice v. Dennis*, 834 F.2d 380 (4th Cir. 1987), *vacated*, 490 U.S. 1087 (1989) somehow controls the disposition of this matter because the case used a Due Process analysis and was later vacated in light of *Graham v. Connor*. Petitioners presumably argue that this Court, in vacating the *Justice* decision, was somehow saying that the Fourth Amendment protections extend after an initial hearing and while being booked into the jail. On the contrary, if one reads *Graham v. Connor*, this Court's action in vacating *Justice* is explicitly set out. *Graham* found that in an excessive force claim brought under § 1983, the analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. *Graham*, 490 U.S. at 394. In explaining how some courts mistakenly assume that there is a generic "right" to be free from excessive force, grounded not in any particular constitutional provision but rather in "basic principles of § 1983 jurisprudence," the court quoted *Justice* as an example. *Graham*, 490 U.S. at 393, n. 8. This Court's action in vacating *Justice* certainly did not imply anything close to support of Petitioners' position.

The Fourth Circuit holds that pretrial detainees are protected from excessive force by the Due Process Clause of the Fourteenth Amendment. *United States v. Cobb*, 905 F.2d

784, 788 (4th Cir. 1990). In fact, in *Cobb*, the Fourth Circuit upheld a criminal conviction for civil rights violations against pretrial detainees in which the trial court had instructed the jury on the law of excessive force using the four part test found in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) *cert. denied*, 414 U.S. 1033 (1973). The *Johnson* factors were the basis for, and are virtually identical to, those used by the Fifth Circuit under *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993).

d. **The Fifth Circuit**

The Fifth Circuit has ruled that the Fourth Amendment protection does not provide a basis for relief after the incidents of arrest are completed. *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993). In *Valencia*, the Court held that the Fourth Amendment provides weak textual support for extending its protection to post arrest conduct because the Fourth Amendment prohibition against unreasonable "seizures," seems to be primarily directed to the initial act of restraining an individual's liberty, such as an investigatory stop or arrest. *Valencia v. Wiggins*, 981 F.2d at 1444. In support of this point, the court cited the case of *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) which held, "[a] natural although not inevitable interpretation of the word 'seizure' would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during the seizure." Presumably, this reasoning stems from the fact that one cannot seize something which one has already seized. Petitioners miss this point in their reliance upon the case of *Brower v. County of Inyo*, 489 U.S. 593 (1989) which involved the act of initially seizing a suspect. In this case, Brothers was already seized and in custody while he was attempting to escape.

e. **The Seventh Circuit**

The Seventh Circuit also acknowledges that in between arrest and conviction, the Due Process Clause applies to excessive force claims. *Kinney v. Indiana Youth Center*, 950 F.2d 462, 465 (7th Cir. 1991). The facts of the *Kinney* are almost identical to this case except for the fact that the Plaintiff in *Kinney* had been convicted. Kinney was an eighteen-year old inmate who was shot while trying to escape from an Indiana correctional facility where he was incarcerated on charges of escape and car theft. In discussing the appropriate standards, the Seventh Circuit stated that in between arrest and conviction, the Due Process Clause applies to preclude the use of force that amounts to punishment. *Kinney*, 950 F.2d at 465 (*citing Bell v. Wolfish*, 441 U.S. 520, 535-36, n. 16 (1979)).

In analyzing Kinney's claims under the Eighth Amendment, the court followed *Whitley v. Albers*, 475 U.S. 312 (1986) and found that the use of deadly force was used to prevent the Plaintiff's escape and that no evidence was produced to infer that the official acted deliberately to inflict pain and suffering. *Kinney*, 950 F.2d at 465-66. Furthermore, citing *Whitley*, the court held that even if the guard gave no verbal warning before shooting, she had no duty to do so. *Id.* at 466. *See Wilkins*, 872 F.2d at 192-93 ("Now once an arrested person is charged but before he is convicted, the question whether the fact, manner or duration of his continued confinement is unconstitutional passes over from the Fourth Amendment to the due process clause.") (*citing, Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (Friendly, J.)).

Thus, the Seventh Circuit is accord with the Fifth Circuit in analyzing a similar fact situation.

f. **The Ninth Circuit**

The Ninth Circuit also follows suit by holding that although the Eighth Amendment proscribes cruel and unusual punishment for convicted inmates, the Due Process Clause of the Fourteenth Amendment protects a pretrial detainee from the use of excessive force which amounts to punishment. *Redman v. County of San Diego*, 942 F.2d 1435, 1440 (9th Cir. 1991)

g. **The Tenth Circuit**

Petitioners cite the cases of *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991) and *Frohmader v. Wayne*, 958 F.2d 1024 (10th Cir. 1992) to support their assertion that there is a split among the circuits. *Austin* held that the Due Process Clause protects pretrial detainees but that the Fourth Amendment provides protection to individuals detained without a warrant. *Austin*, 958 F.2d at 1160. Therefore, according to that court, the Fourth Amendment provides no further protection and Due Process would apply when individuals are detained *with* a warrant. The *Austin* decision does not conflict with the *Brothers* because at the time of Brothers' death, he had already been in custody and had been formally charged with warrants having been issued. *Frohmader* also involved alleged excessive force prior to the arrestee having been brought before a judicial officer for a determination of probable cause. As stated above, Brothers had already been formally charged and had outstanding warrants for his arrest.

The Tenth Circuit recently discussed *Austin* and *Frohmader* in *Pride v. Does*, 997 F.2d 712 (10th Cir. 1993) and stated that *Austin* extends Fourth Amendment protection to pretrial detainees following a warrantless arrest up to the time

of a judicial determination of probable cause to arrest. *Id.* at 716. Had Brothers been apprehended in the Tenth Circuit, the Fourth Amendment would not apply to him because he was taken into custody by Harris County pursuant to outstanding warrants. See also *Weimer v. Schraeder*, 952 F.2d 336 (10th Cir. 1991), *cert. denied* 112 S.Ct. 3006, 120 L.Ed.2d 881 (1991); *Bella v. Chamberlain*, 24 F.3d 1251, 1257 (10th Cir. 1994).

Therefore, even under this Tenth Circuit approach, the analysis of Brothers' claims would be measured by the Due Process Clause. These cases support the proposition that at some point during arrest, the protections of the Fourth Amendment end. This is in accord with the decision in this case although the point selected by the Fifth Circuit is at a different point along the continuum between arrest and pretrial detention.

h. **The Eleventh Circuit**

Petitioners erroneously rely heavily upon the cases of *Ayler v. Hopper*, 532 F. Supp. 198 (N.D. Ala. 1981) and *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985). The District Court case of *Ayler* was decided before the Supreme Court decisions of *Tennessee v. Garner*, 471 U.S. 1 (1985), *Whitley v. Albers* and *Graham v. Connor*. The Eleventh Circuit case of *Pruitt* dealt with the use of deadly force upon fleeing felony suspects. The same court recently stated that the Fourth Amendment and the *Tennessee v. Garner* rationale has not yet been extended to protecting pretrial detainees and that the difference between suspects and pretrial detainees may be a constitutionally significant distinction. *Wright v. Whiddon*, 951 F.2d 297 (11th Cir. 1992). This ruling effectively overrules any implied holdings to the contrary in the *Pruitt* and *Ayler* decisions and they have

no analytical value in regard to the issues presented in this appeal.

B THIS COURT'S DECISION IN *ALBRIGHT* IS NOT DISPOSITIVE

Petitioners assert that this Court's decision in *Albright v. Oliver*, 510 U.S. ___, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) resolves the issued presented in this petition. This is not correct for several reasons. First, as the Fifth Circuit found, *Albright* dealt with an individual complaining of an arrest warrant and prosecution without probable cause. That scenario is far different from a pretrial detainee escaping from custody. *Brothers*, 28 F.3d at 456. The claim in *Albright* was directed at the initial seizing - extended to the entire incarcerating and charging. Mr. Brothers had already been seized and incarcerated. Any alleged excessive force inflicted upon him at that time could not be considered a seizure in the Fourth Amendment sense since he had already been seized. Such a claim is not an attack on the authority or reasonableness of the initial custody/incarceration seizure, but deals with events transpiring after the lawful seizure. The concept of a seizure while being seized was not addressed in the *Albright* case and its holding does not conflict with the Fifth Circuit's decision.

C. PRETRIAL DETAINEES DO NOT RECEIVE THE SAME CONSTITUTIONAL PROTECTIONS AS "FREE" CITIZENS.

On page 8 of their petition, petitioners claim that "[s]uspects killed while attempting to escape custody are in no different constitutional position than suspects killed while fleeing to avoid custody." This Court has held otherwise. In

Bell v. Wolfish, 441 U.S. 520 (1979), this Court held that "[a] detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Bell*, 441 U.S. at 546. Moreover, the Court in *Bell* explained that pretrial detainees may be considered at least as dangerous as convicted prisoners.

In language particularly applicable to this matter, this Court wrote:

> Neither the Court of Appeals nor the District Court distinguished between pretrial detainees and convicted inmates in reviewing the challenged security practices, and we see no reason to do so. There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order. See, *e.g.*, *Main Road v. Aytch*, 565 F.2d, at 57. In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial. See 18 U.S.C. § 3146. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates.

Bell, 441 U.S. at 546, n. 28.

Therefore, in *Bell*, this Court recognized the security risks involving pretrial detainees, particularly the threat of escape.

The *Bell* court also recognized that maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of retained constitutional rights of both convicted prisoners and pretrial detainees and prison officials must be free to take appropriate action to ensure safety of inmates and corrections personnel and to prevent escape or unauthorized entry. *Bell*, 441 U.S. at 546-547.

These same concerns are at the heart of the Harris County policy which is intended to prevent escapes and the inherent dangers to deputies and citizens when inmates decide to rebel against the legitimate custody imposed by our judicial system. These principles compel the conclusion that pretrial detainees do not retain the same extent of constitutional protections afforded citizens not in custody.

II.
APPLICATION OF EIGHTH AMENDMENT FACTORS IN DUE PROCESS CLAIMS DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

a. Eighth Amendment Factors are Appropriately Applied.

Petitioners complain that the Fifth Circuit employs an analysis derived from *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) and *Whitley v. Albers*, 475 U.S. 312 (1986) to evaluate claims of excessive force brought by pretrial detainees. Because those two cases involved Eighth Amendment claims by convicted felons, Petitioners object to the Fifth Circuit's application of their rationale to pretrial detainees. However, the decisions of the

Fifth Circuit are logically based upon the decisions of this Court.

After determining that Brother's status was as a pretrial detainee - having been processed into jail with outstanding warrants - the Fifth Circuit concluded that he was protected from excessive force by the Due Process Clause and employed the analysis enunciated in *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2998 (1993). *Valencia* reiterated the holding in *Bell v. Wolfish*, 441 U.S. 520 (1979), that there is no reason to distinguish between pretrial detainees and convicted inmates in reviewing challenged security practices because there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates. Such holding of this Court in *Bell* led the *Valencia* Court to conclude that excessive use of force claims brought by pretrial detainees should not be analyzed under *Bell's* conditions of confinement standard but against the standard announced by the Supreme Court in *Whitley v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995 (1992). Specifically, the *Valencia* Court held:

> For these reasons, we conclude that excessive use of force claims by pretrial detainees should not be analyzed under Bell's conditions of confinement standard. Instead, we are guided by the standard announced in *Whitley* and *Hudson*. While these cases specifically addressed claims of excessive use of force brought by convicted prisoners, it is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security. Moreover, the Court indicated in *Hudson* that many of its concerns in *Whitley*

> were not limited to Eighth Amendment claims but "arise whenever guards use force to keep order." ... Therefore, when a court is called upon to examine the amount of force used on a pretrial detainee for the purpose of institutional security, the appropriate analysis is that announced in *Whitley* and *Hudson*: whether the measure taken inflicted unnecessary and wanton pain and suffering depends on "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." *Valencia*, 981 F.2d at 1446.

Rather than focusing on the extent of the injury to determine if a particular use of force was excessive, the Court probes the subjective intent of the detaining officers. *Bender v. Brumley*, 1. F.3d 271, 278 (5th Cir. 1993).

The *Whitley* and *Hudson* Courts stated that several factors are relevant in determining the intent of the detaining officer. These include:

1. the extent of the injury suffered;

2. the need for the application of the force;

3. the relationship between the need and the amount of force used;

4. the threat reasonably perceived by the responsible officials; and

5. any efforts made to temper the severity of a forceful response.

Hudson v. McMillian, 503 U.S. ___, 112 S.Ct. 995, 999 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986). As stated in *Valencia and Bender*, the focus of the inquiry is on the detention facility official's subjective intent and the calculus of the trier of fact must include such objective factors as the need for the application of force, the degree of force exerted, the threat reasonably perceived by the detention facility official, and the need to act quickly and decisively. *Valencia*, 981 F.2d at 1446.

The reasoning of the Fifth Circuit is further supported by this Court's holding in *Whitley* that "the Due Process Clause affords respondent (a convicted prisoner) no greater protection that does the Cruel and Unusual Punishments Clause." *Whitley*, 475 U.S. at 327.[2] Therefore, the application of this Court's Eighth Amendment analysis to claims of Due Process violations does not deprive pretrial detainees of any rights afforded by the Fourteenth Amendment.

Applying the above factors and reasoning, the Fifth Circuit in *Brothers* concluded that the sheriff's department policy is designed "in a good faith effort to maintain or restore discipline" and not "maliciously and sadistically for the very purpose of causing harm." *Brothers*, 28 F.3d at 457. Given the language in *Bell* and *Whitley*, application of an Eighth

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2 As admitted by Petitioners on Page 20 of their petition, this reasoning was confirmed in *Graham v. Connor*, 490 U.S. at 395 n. 10: "Any protection that "substantive due process" affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment."

Amendment analysis to Due Process claims of pretrial detainees does not conflict with the decisions of this Court.

b. The Fifth Circuit Correctly Applied the Eighth Amendment Factors.

On Page 22 of their petition, Petitioners claim that "[e]ven if Eighth Amendment analysis controls the scope of Fourteenth Amendment substantive due process, the two-prong test utilized by the Fifth Circuit is contrary to applicable decisions of this Court, establishing a more refined evaluative standard." The Fifth Circuit did not utilize a two-prong test. As is clear from the *Brothers* opinion, the Court utilized the standard set out in *Valencia*. *Brothers*, 28 F.3d at 457. *Valencia* specifically tracked the standard set out by *Whitley* and *Hudson*. *Valencia*, 981 F.2d at 1446. A rational reading of the *Brothers* opinion clearly demonstrates that the Fifth Circuit follows the language of this Court's holdings in *Whitley* and *Hudson* when applying Eighth Amendment standards.

Next, Petitioners claim that this Court's decisions directly contradict the holding of the Fifth Circuit. They do this by arguing that a "deliberate indifference" standard is somehow applicable to this case because such a mental state is required in claims involving prison conditions. Brief of Pet. p.24. However, each of the cases cited by Petitioners involved conditions of confinement.

In *Hudson*, this Court specifically ruled that the "deliberate indifference" standard was inapplicable to excessive force cases and that "the core judicial inquiry is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and

sadistically to cause harm." *Hudson*, 503 U.S. at ___, 112 S.Ct. at 999. The Court in *Hudson* reasoned that a "deliberate indifference" inquiry is appropriate in medical deprivation cases because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns. *Hudson*, 503 U.S. at ___, 112 S.Ct. at 998 (*citing Whitley*, 475 U.S., at 320, 106 S.Ct., at 1084-85). In *Hudson*, this Court went on to contrast medical deprivation claims with officials confronting a prison disturbance who must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance." *Id.* at 998.

Petitioners argue that the facts of this case are somehow more akin to the medical deprivation situation rather than the prison disturbance setting of *Whitley* because the shooting of Mr. Brothers was pursuant to a Sheriff's Department Policy. Even if we ignore the unambiguous language of *Hudson* which sets the standard for excessive force cases, Petitioners' argument is not persuasive. Specifically, Petitioners claim that this Court in *Hudson* and *Whitley* was referring to the mental state of a particular individual suddenly confronted with a dangerous situation involving immediate and actual risks to safety, rather than a formal or official policy promulgated after deliberative processes to be applicable in all circumstances. What Petitioners leave out of the equation is the fact that although Brothers was shot pursuant to an official policy, certain facts are necessarily present whenever the policy is employed. Specifically, as the Fifth Circuit found, the Harris County policy only allows deadly force as a last resort - when immediately necessary to prevent and escape. In such circumstances, there is always going to be "a dangerous situation involving immediate and actual risks to safety."

In every case, the particular official facing the escape attempt must make his or her decisions "in haste, under pressure, and frequently without the luxury of a second chance." It goes without question that the Fifth Circuit correctly applied the Eighth Amendment analysis derived from *Whitley* and *Hudson*.

III.
PETITIONERS' FAILURE TO ACCURATELY PRESENT THEIR ARGUMENTS IN THE PETITION

In accordance with Rule 15.1, Respondents point out the following misstatements contained in the petition in addition to those mentioned above:

On page 3 of their petition, petitioners claim that the deputies who shot Brothers, Rizk and Nichols "did not believe him to be a danger either to themselves or to anyone in the vicinity, and possessed no knowledge of any prior charge against Brothers any form of violence or use of weapons." In actuality, Deputy Rizk testified that he had been told that Brothers had escaped from Louisiana and that "it was some type of a strong armed robbery, possibly using a deadly weapon." Deputy Nichols testified "I'm not sure who it was that told me; but there was something mentioned about a robbery, be it an armed robbery, a strong armed robbery, something to that effect. I was told and I recall seeing somewhere that he was either extremely dangerous or considered dangerous."

On page 4, footnote 3 of the petition, Petitioners claim that the Fifth Circuit did not reach the issue of whether Harris County's alleged failure to train its armed deputies in the constitutional use of deadly force deprived Brothers of his constitutional rights. This is a clear misstatement. The Fifth

Circuit specifically held that Petitioners failed to adduce any evidence of the alleged failure to train or its connection to the prevention of Brother's escape. *Brothers*, 28 F.3d at 458. Because Petitioners did not adduce any evidence, they did not meet their burden in responding to Respondent's motion for summary judgment. *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992).

These and the other examples of misstatements and mischaracterizations made by Petitioners as referenced in this Brief in Opposition compel summary denial of Petitioners' Petition.

CONCLUSION

Petitioners have failed to establish any reason for this Court to grant certiorari in this case. Respondents therefore ask this Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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